No. 89-1316

In The Supreme Court of the United States October Term, 1989

RONALD BEHAGEN,

Petitioner,

v.

USA BASKETBALL and WILLIAM WALL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied. The decision of the Court of Appeals is supported by and consistent with the decisions of this Court, does not present a conflict between circuits, and does not involve any novel issue of law or public policy.

The unique facts of this case are unlikely to occur again because this litigation involves the distinction between "amateur" and "professional" formerly in effect in international basketball competition. That distinction has now been eliminated. This case, for this and other reasons, does not present the exceptional circumstances warranting this Court's attention. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 67 L.Ed. 712, 714 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79, 99 L.Ed. 897, 904 (1954).

I.

THE DUE PROCESS HOLDING FOLLOWS THIS COURT'S DIRECT MANDATE

The Court of Appeals' holding that petitioner's due process claim is barred because respondents are not governmental actors is mandated by this Court's recent decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 97 L.Ed.2d 427 (1987). Under the Amateur Sports Act of 1978 (36 U.S.C. § § 371-396 and hereafter "Amateur Sports Act"), the United States Olympic Committee ("USOC") is authorized to recognize as a national governing body ("NGB") an amateur sports organization, but shall recognize only one NGB for each sport. 36 U.S.C. § 391 (a). Pursuant to that authorization, the USOC has "recognized" as the NGB for basketball the respondent, USA Basketball (formerly known as "Amateur Basketball Association of the United States of America" and referred to in the opinion of the Court of Appeals as "ABA/USA").

Petitioner has argued that the USOC's recognition of respondent USA Basketball as the NGB for the sport of basketball makes USA Basketball a governmental actor. The Court of Appeals' rejection of that contention is not only correct, it is mandated by this Court's holding in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., supra.* In that opinion, this Court held that the USOC was not a governmental actor. *San Francisco Arts & Athletics,* 483 U.S. at 547, 97 L.Ed.2d at 955. Referring to the Amateur Sports Act, which *inter alia* chartered the current USOC, the Court noted that: "[t]he fact that Congress granted it a corporate charter does not render the USOC a Government agent." *Id.* at 543, 97 L.Ed.2d at 453.

In the present case, the Court of Appeals aptly stated:

> Our analysis here is simplified by the pronouncements of the Supreme Court in *San Francisco Arts & Athletics* . . . The Court there held that the USOC was not 'a governmental actor to whom the prohibitions of the Constitution apply.'

* * * *

> Proceeding from this certain ground that the USOC is not a governmental actor, it follows a fortiori that the ABA/USA is also not a governmental actor. Congress has conferred no authority upon the ABA/USA except that authorized because of its recognition as an NGB. Such recognition by statute must come through the USOC. If the Amateur Sports Act has not created a governmental actor in the USOC, it most certainly has not done so in the ABA/USA . . . .

Behagen v. Amateur Basketball Ass'n of the United States, 884 F.2d 524, 531 (10th Cir. 1989) (Petitioner's App. at 14a - 15a) (citation omitted).

Thus, the Tenth Circuit directly follows *San Francisco Arts & Athletics*. The petitioner seeks to have this Court reverse its *San Francisco Arts & Athletics* decision less than three years after it was issued.

II.

THE ANTITRUST HOLDING FOLLOWS CONGRESSIONAL INTENT

The Court of Appeals held that when Congress enacted the Amateur Sports Act, Congress intended to exempt NGB's such as USA Basketball from the type of antitrust claim asserted by petitioner. The Court of Appeals recognized "that congressional intent to exempt action from the federal antitrust laws should be implied only when necessary to implement the clear intent of Congress." *Behagen*, 884 F.2d at 529 (Petitioner's App. at 10a). Nevertheless, applying the standard set forth in *Silver v. New York Stock Exchange*, 373 U.S. 341, 10 L.Ed.2d 389 (1963), the Court of Appeals recognized that the Amateur Sports Act itself establishes that Congress did intend to exempt certain actions of NGB's from antitrust claims.

The Act provides that the USOC is to recognize one and only one NGB for any one sport. 36 U.S.C. § 391 (a). It grants each NGB exclusive authority and control for certain matters. More specifically, Congress has provided that an NGB such as USA Basketball must be "autonomous in the governance of its sport, in that it independently determines and controls all matters

central to such governance, does not delegate such determination and control . . . ." 36 U.S.C. § 391 (b) (4). Among the matters by legislative direction that an NGB must control is the exclusive authority to set eligibility standards that are not more restrictive than the applicable international rules. *See* 36 U.S.C. § § 373 (1) and 391 (b) (12).

In this case, petitioner asserts that respondents violated the antitrust laws when Behagen's amateur eligibility was not reinstated after his second stint as a professional basketball player in the United States. As the Court of Appeals pointed out:

> Behagen complains of exactly that action which the Act directs — the monolithic control of an amateur sport by the NGB for that sport and by the appropriate international sports federation of which the NGB is a member. This truth is underscored by the fact that the ABA/USA could not be authorized under the Act unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation. *See* 36 U.S.C. 391 (b) (4). We hold that the defendants' actions were necessary to implement the clear intent of Congress, and therefore are exempt from the federal antitrust laws.

Behagen, 884 F.2d at 529-530 (Petitioner's App. at 11a).

Because Congress has given an NGB such as USA Basketball monolithic control concerning amateur eligibility, the Court of Appeals was correct in holding that exercise of this authority is exempt from the federal antitrust laws.[1]

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[1] *Gunter Harz Sports, Inc. v. United States Tennis Ass'n, Inc.*, 665 F.2d 222 (8th Cir. 1981), relied on by petitioner, is inapposite because the facts at issue in *Gunter Harz Sports* took place prior to the effective date of the Amateur Sports Act, which was November 8, 1978. [See the lower court opinion, 511 F. Supp. 1103, 1108-1111 (D.Neb. 1981)]. It is the Amateur Sports Act that establishes congressional intent to exempt NGB's such as respondents from the type of antitrust claim asserted by petitioner, and this Act was not at issue, or even mentioned, in *Gunter Harz Sports*.

The Court of Appeals' antitrust holding is consistent with its due process holding. Petitioner incorrectly asserts that an antitrust exemption cannot apply to a private rather than a governmental actor. But this court has found private parties exempt from the antitrust laws under the *Silver* doctrine. *E.g., United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 45 L.Ed.2d 486 (1975); *Gordon v. New York Stock Exchange*, 422 U.S. 685, 45 L.Ed.2d 463 (1975).

In *San Francisco Arts & Athletics*, this Court recognized that the persons authorized under the Amateur Sports Act were not governmental actors, and that "[t]he Amateur Sports Act was enacted 'to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States.' " 483 U.S. at 544, 97 L.E.2d at 453 (quoting H.R. Rep. No. 1627, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7482). Applying *Silver*, the Court of Appeals stated:

> Although an NGB [like USA Basketball] is a private actor, the monolithic control exerted by an NGB over its amateur sport is a direct result of the congressional intent, expressed in the Amateur Sports Act. In such a situation, we follow the Supreme Court's analysis in *Silver v. New York Stock Exch.*, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed.2d 389 (1963), and *focus on the degree to which the private action was necessary to implement the intent of Congress.*

Behagen, 884 F.2d at 528 (Petitioner's App. at 9a) (emphasis added).[2]

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[2] Thus, Congress intended the Amateur Sports Act to eliminate problems caused by undue competition. This means petitioner's reliance on *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 358, 69 L.E.2d 89 (1981) is misplaced. *National Gerimedical* involved health care legislation where the congressional intent was the exact opposite, namely the "promotion of competition at the local, state and federal levels." *Id.* at 387, 69 L.Ed.2d at 98. This opposite congressional intent required the Court to hold there was no antitrust exemption.

For antitrust exemption purposes, the test then is not whether a private corporation is a private or governmental actor, but rather "the degree to which the private action was necessary to implement the intent of Congress." *Behagen,* 884 F.2d at 528 (Petitioner's App. at 9a). Thus a private actor like USA Basketball can also with complete consistency, as the Court of Appeals held, be exempt from the antitrust laws because of implied congressional intent.

The Court of Appeals would also necessarily have dismissed petitioner's antitrust claim on other grounds, if it had not first found an implied antitrust exemption. As a matter of law, even if otherwise applicable, Behagen could not make out a *prima facie* case for violation of the antitrust laws. In particular, subject matter jurisdiction for antitrust purposes was lacking, because Behagen's right to play basketball in Italy as a salaried employee did not have, as required, "an actual effect on United States commerce." *Montreal Trading Ltd. v. Amax, Inc.,* 661 F.2d 864, 869 (10th Cir. 1981), *cert. denied,* 455 U.S. 251 (1982).

Instead, the conduct that petitioner challenges had "insufficient contacts with and effects upon commerce within the United States to justify federal court jurisdiction. Congress did not intend to police every conspiracy in the world involving a conspirator who may be reached by federal court service of process." *Montreal Trading Ltd.,* 661 F.2d at 868. *See also Timberlane Lumber Co. v. Bank of America, N.T. and S.A.,* 549 F.2d 597, 613-15 (9th Cir. 1976), *after remand cert. denied,* 472 U.S. 1032, 87 L.Ed.2d 643 (1985); *de Atucha v. Commodity Exchange, Inc.,* 608 F.Supp. 510, 517-518 (S.D. N.Y. 1985); *Power East Limited v. Transamerica Delavel, Inc.,* 558 F. Supp. 47, 49 (S.D. N.Y. 1983), *aff'd,* 742 F.2d 1439 (2d Cir. 1983). The antitrust laws have never been applied to merely trivial effects on United States commerce. *E.g., American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 53 L.Ed. 2d 826 (1909).

Indeed, the petitioner concedes that this case involves activities outside the ambit of United States commerce and, therefore, outside the protected scope of the antitrust laws. In arguing that the activities of respondents fall "outside the scope of their Congressional mandate" and, therefore, outside any antitrust exemption, the petitioner pleads that USA Basketball

should not "reach across the ocean and preclude American citizens from earning a living playing sports on foreign teams." (Petition for Writ of Certiorari at 22). This is precisely the type of foreign activity not protected by the antitrust laws because there is not the required effect on United States commerce.

CONCLUSION

For all the reasons set forth above, this Court should deny this petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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